Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Further Forbearance from Title II Regulation for Certain Types of Commercial Mobile Radio Service Providers	)	GN Docket No. 94-33

U S WEST REPLY COMMENTS

The commercial mobile radio services market is at a critical juncture. For the first time in the history of this nation's telecommunications industry, the Commission has been armed with the authority and been given the challenge to permit the future development of this fastest growing segment of the industry to be governed by competition rather than by a comprehensive (and often disparate) set of regulations.

Congress, noting that the mobile services market is already competitive, has expressed its preference for reliance on competition rather than regulation by giving this Commission express forbearance powers. With this authority, the Commission now has the flexibility to decide that certain Title II provisions, largely enacted for the wireline industry at a time when competition was non-existent, are no longer necessary to protect the public. The Commission, in its CMRS Order, took a giant step in discharging this Congressional directive by removing for CMRS services the most onerous, and anticompetitive, provisions of Title II.[1]

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[1] *See* Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order, GN Docket No. 93-252, 9 FCC Rcd 1411 (March 7, 1994)("CMRS Order").

With the allocation of 140 MHz of new spectrum to support additional CMRS services, coupled with the additional capacity now being made available in existing CMRS networks (because of the deployment of digital technologies), the CMRS market will soon become super-competitive. It is therefore entirely appropriate that the Commission commenced this proceeding to examine whether, given this development, additional forbearance for CMRS services is warranted. The comments submitted indicate that it may very well be appropriate to now forbear from applying additional Title II provisions. Regulations designed to protect consumers in the absence of competition have no place in a competitive market — and, as the Commission determined in its CMRS Order, such regulations can actually undermine competitive forces and, in the process, harm consumers.

As part of this further forbearance proceeding, the Commission has also asked whether it should engage in "selective" forbearance, whereby different CMRS services, or even different CMRS providers providing similar services, are regulated differently. While Congress certainly gave this Commission the flexibility to treat different CMRS services differently, it cautioned that "[d]ifferent regulation . . . is permissible but is not required in order to fulfill the intent of this section."[2] It bears repeating that Congress expects that similar services be subject to consistent regulatory classifications; indeed, the motivating reason Congress revised Section 332 was to remove

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[2]H.R. Conf. Rep. No. 103-213, 103d Cong., 1st Sess. 491 (1993)("Conference Report")(emphasis added), *reprinted in* 1993 U.S. Code Cong. & Admin. News at 1180. *See also* 47 U.S.C. § 332(c)(1)(A).

regulatory disparities that had been so prevalent in the past.[3] The Commission, too, has observed that regulatory symmetry is essential if the public is to realize the full benefit of competitive forces:

> Success in the marketplace . . . should be driven by technological innovation, service quality, competition-based pricing decisions, and responsiveness of consumer needs — and not by strategies in the regulatory arena. This even-handed regulation, in promoting competition, should help lower prices, generate jobs, and produce economic growth.[4]

The Commission should exercise great care before embarking on a path of "selective" forbearance. "Selective" forbearance among different CMRS services is appropriate only if the Commission can say with confidence not only that certain CMRS services are truly different from each other, but also that certain CMRS services will remain different from other CMRS services in the future.

In this regard, the Commission has already observed that the CMRS market will likely undergo "significant change in the next few years" and that the market may very well evolve such that "CMRS licensees that offer

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[3]*See, e.g.*, Nextel Reply, GN Docket No. 93-252, at 5-6 (Nov. 23, 1993)(""Congress made clear . . . that its primary objective was to assure that functionally equivalent services, i.e., 'like' or substitutable services, are regulated similarly, i.e., within the same regulatory classification. In determining whether services are functionally equivalent, the Commission must look to the nature of the service as a whole and, most importantly, to how the service is perceived from the customer's point of view."). Remarkably, although Nextel has conceded from the outset that its service is comparable to, and substitutable for, cellular service, it continues to argue that it should be eligible for "special" regulatory handicaps. *See* Nextel Comments, GN Docket No. 94-33. *But see* Nextel Reply, *supra* at 9 ("The Commission has the responsibility for assuring that like services are regulated similarly and to promote a competitive mobile communications marketplace.").

[4]CMRS Order, 9 FCC Rcd at 1420 ¶ 19 (emphasis added).

different service now may eventually become competitors."[5] Consequently, engaging in "selective" forbearance based on the market as it exists today (or attempting to predict how the market will evolve in the future) will likely result in the very sort of mischief that Congress wants eliminated — that is, where success in the market is attributable, not to the ingenuity of CMRS providers, but rather to disparate regulations imposed among CMRS services that appear different today.[6]

The CMRS market is very fluid and there is considerable evidence that the array of mobile services within this market are beginning to converge.[7] The development of digital technologies and entrepreneurial ingenuity have resulted in enhanced SMR, a service that has blurred the distinction between traditional SMR services and cellular services. Indeed, the historical classifications still being used to describe various market participants (*e.g.*, cellular, ESMR) no longer reflect accurately the services these participants actually offer to the public.[8]

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[5]CMRS Further Notice of Proposed Rulemaking, GN Docket No. 93-252, FCC 94-100, at 40 ¶ 86 and 42 ¶ 91 (May 20, 1994).

[6]The Commission must, therefore, reject the arguments of a few that it should engage in "selective" forbearance based upon the market as it supposedly exists today as opposed to two years from now, when narrow- and broadband PCS networks are operational. What these commenters seek is nothing less than a regulatory handicap to give them a competitive edge not available to existing and future CMRS providers.

[7]*See e.g.*, Nextel Reply, GN Docket No. 93-252, FCC 94-100, at 8-9 (Nov. 23, 1993)("The mobile services industry is undergoing dramatic evolution. Traditional service attributes, capabilities and classifications are changing in response to new technology, customer demands and competitive requirements. The Commission has the responsibility for assuring that like services are regulated similarly and to promote a competitive mobile communications marketplace.").

[8]As but one example, PCS providers will use a "cellular" network architecture, and cellular carriers will provide "personal communications services." Similarly, ESMR provides use a "cellular" architecture and will provide PCS services; indeed, ESMR providers can provide a

Continued on Next Page

In the end, the only distinctions among CMRS services that potentially could be material are the particular spectrum band being used and the amount of frequency held by different CMRS providers. But even these distinctions are immaterial to the consuming public, who are concerned only with the ability to communicate while on the move.

In this environment, the Commission should allow competitive forces to determine how the spectrum bands allocated to CMRS services are best utilized to meet the needs of the public. The premature application of "selective" forbearance among CMRS services that appear different today may skew the natural evolution of the market place. On the other hand, there is little downside with maintaining regulatory symmetry for all CMRS services. With symmetry, CMRS licensees will simply have to rely upon their own ingenuity to succeed rather than overcome regulatory handicaps or take advantage of favorable regulations not available to competing services.

U S WEST is especially troubled by the concept of "selective" forbearance among CMRS carriers providing similar CMRS services (*e.g.*, different regulations based on such considerations as size or the amount of frequency one happens to hold at a particular time). At the outset, there is a substantial question whether this Commission may lawfully engage in such "selective" forbearance. There is nothing in the Budget Act or its legislative history suggesting that this Commission may use a size-based forbearance standard, and use of such a classification scheme would be repugnant to the principle of regulatory parity that Congress wants achieved. Congress di-

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more robust set of services than cellular carriers, which remain prohibited (by regulation rather than technology) from providing dispatch services.

rected this Commission "to review and analyze competitive market conditions with respect to commercial mobile services," noting that "market conditions may justify differences in . . . regulatory treatment."[9] The directive to focus on markets suggests that the flexibility which Congress empowered the Commission was for differential regulation of CMRS services — and not of CMRS carriers providing similar services.

Moreover, use of a sized-based forbearance standard would appear to be contrary to, if not flatly inconsistent with, the forbearance standard Congress has directed this Commission to use. The second prong of this three-part test requires a finding that "enforcement of such [Title II] provision is not necessary for the protection of consumers."[10] A service provider's size has nothing to do with consumer protection. If consumers need certain protections, they need these protections regardless of the identity of their serving carrier and regardless of the size of that carrier.[11]

It may very well be that there are certain classes of consumers requiring less protection than other classes of consumers (*e.g.*, business vs. residential). But the record in this proceeding does not, at least at this time, support "selective" forbearance based upon the particular customer class being served. And there is certainly no logic or sound public policy basis to give less

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[9]*See* note 2 *supra*.

[10]47 U.S.C. § 332(c)(1)(A).

[11]Indeed, if history is any guide, consumers often need more protection from smaller service providers than larger ones. For example, the problems that led to enactment of Telephone Operator Consumer Services Improvement Act were caused, not by the large carriers but by new small entrants.

protections to a certain class of consumer depending upon the size the service provider.

However, there is no basis to favorably handicap small service providers even if the Commission may lawfully use a size-based forbearance standard. Special, favorable treatment would be appropriate only if, at minimum, imposition of a particular Title II provision would impose a disproportionate impact on small carriers because the costs to comply with a provision are relatively fixed.[12]

None of the reclassified CMRS providers seeking special handicaps for themselves provides any facts demonstrating that application of any of the remaining Title II provisions will have a disproportionate impact on them. Absent this evidence, there is no reason whatever for this Commission even to consider giving special treatment to any class of CMRS provider.

Illustrative of this fatal omission is the argument of several CMRS Part 90 carriers (or their associations) concerning Telecommunications Relay Service. Several newly-classified CMRS carriers, largely SMR providers, argue that their provision of TRS would be "burdensome," "cost prohibitive," and "economically infeasible."[13] Not only are these arguments unsupported

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[12]Importantly, even if a petitioning CMRS provider can demonstrate (with facts) a disproportionate impact, the Commission must still examine two additional questions. First, it needs to determine whether the benefits of the consumer protections afforded by the provision in question are outweighed by these costs. Second, if implementation costs outweigh the benefits of the consumer protections, the Commission must then decide who is eligible for special treatment given the fact that any fixed cost disproportionately impacts all but the largest carrier in the market.

[13]*See, e.g.*, AMTS at 12-14; Dial Page at 5-7; E.F. Johnson at 9-10; Geotek at 6-8; NABER at 7-8; OneComm at 7-9; WJG at 6-8.

by a shred of evidence, but these commenters do not even allege the provision of TRS would disproportionately impact them. Moreover, these undocumented claims cannot be squared with the little evidence in the record, which suggests that TRS can be provided even by small SMR systems:

> The Southern SMR system will have the capability to provide telecommunications relay service ("TRS") for hearing and speech-impaired individuals at their request. Southern believes that providing such services is not overly burdensome for CMRS licensees, especially since provision of TRS can be contracted out to third parties.[14]

In the end, the real beef of the few reclassified CMRS Part 90 providers is with Congress and not the Commission's proposals to discharge Congress' regulatory parity directive. After all, it was Congress which determined that those Part 90 carriers, having decided to offer interconnected service to the public for a profit, should shoulder the same regulatory obligations that have long been assumed by Part 22 licensees. However, as the Commission has already noted, the new burdens associated with one's CMRS reclassification have been "substantially ameliorate[d]" because of the three-year transition period and the forbearance undertaken in the CMRS Order.[15]

As stated at the outset, the CMRS market is at a critical crossroads. At issue is whether, given the existence of a competitive (and soon to be super competitive) market, this Commission should rely on competitive forces or regulations.

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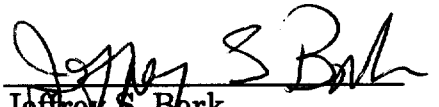
[14]Southern at 5-6.

[15]Notice, GN Docket No. 94-33, FCC 94-101, at 5 ¶ 7.

But however this line may be drawn, one thing is evident: only even-handed, symmetrical regulation will promote the public interest. If a particular CMRS provider (or group of CMRS providers) believes that application of a particular Title II provision will have a disproportionate impact on it, it can always file a petition for relief and support its petition with facts. Until such facts are in the record (and they are not now), this Commission should continue its course in discharging the clear congressional intent: (1) rely upon competition as much as possible, and (2) to the extent regulations remain warranted, apply those regulations uniformly.

Respectfully submitted,

U S WEST, Inc.



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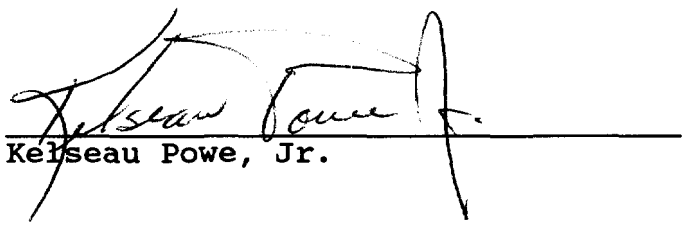
July 11, 1994

CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify that on this 11th day of July, 1994, I have caused a copy of the foregoing **U S WEST REPLY COMMENTS** to be served via first-class United States Mail, postage prepaid, upon the persons listed on the attached service list.



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